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December 15, 2009

***Via Electronic and U.S. Mail***

Thomas K. Butt
City Council Member
City of Richmond
117 Park Place
Richmond, California 94801
tom.butt@intres.com

RE: Point Molate, Interpretation of Settlement Agreement in
*Citizens for the East Shore State Park, et al. v. City of Richmond, et al.*
Marin County Superior Court, The Honorable Vernon F. Smith, Case No. CV 052241

Dear Council Member Butt:

I am in receipt of your letter dated December 13, 2009, asking for the Attorney General's Office's understanding of the obligations of the City of Richmond under a Land Development Agreement ("LDA") between the City and Upstream Point Molate LLC ("Upstream") as modified by the Settlement Agreement in the *Citizens for the East Shore State Park* litigation, also known as the "Point Molate Action." The Attorney General was a party to this action, and I was the Deputy Attorney General who personally negotiated the 2005 Settlement Agreement resolving the case. This letter summarizes our view of the purpose and intent of the Settlement Agreement and its relationship to the LDA.

As you are likely aware, in April 2005, the Attorney General, on behalf of the People, filed a complaint in intervention in the Point Molate Action. A copy of the Attorney General's complaint in intervention is attached for your reference. In this action, the petitioners, including a citizens group and the East Bay Regional Park District. and the Attorney General contended that the City had violated the California Environmental Quality Act ("CEQA") by entering into the November 2004 LDA without preparing an environmental document. As the Attorney General noted:

> *Before* they made their decision, City Respondents were required to evaluate the environmental setting, e.g., whether the proposed development was consistent with applicable general and regional plans. (See 14 Cal. Code Regs., § 15125, subd. (d).) They were required to examine reasonable alternatives to the project, e.g., whether this water front property was suitable for a public beach or park (see Government Code § 37351) or for inclusion in the East Bay Regional Parks District. (14 Cal. Code Regs., § 15126.6.) And they were required to evaluate mitigation measures and incorporate them into the project if feasible. (Id., see also 14 Cal Code Regs., § 15126.4.)

(Complaint in Intervention at ¶ 31 [emphasis in original].)

To resolve the litigation, all of the parties, including the developer, Upstream, signed a Settlement Agreement. A copy of the Settlement Agreement is attached for your reference. The purpose of the Settlement Agreement was to establish an interpretation of the November 2004 LDA that would not violate the law. Specifically, our objective was to insure that the LDA not create any "bureaucratic and financial momentum" in favor of the development before the City had complied with CEQA. (See *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 395.) Accordingly, the Settlement Agreement expressly stated that whatever the terms of the LDA, they could not be interpreted to restrict in any way the City's "discretion to select any alternative use or non-use of the Point Molate site that was open to it before approval and execution of the LDA, including, but not limited to, alternatives that do not involve: a gaming and/or entertainment complex or the Project or Alternative Proposal." (Settlement Agreement at ¶ 1.a.) Moreover, the Settlement Agreement clarified that neither the City's exercise of that discretion, nor its decision not to transfer or lease the land to Upstream, would constitute a default under the LDA. (*Id.* at ¶ 1.b.)

As evidenced by its plain language, the Settlement Agreement was designed to create a "blank slate" so that the City could comply with CEQA. Any interpretations of the 2004 LDA that would restrict the City's ability to consider alternative uses of the site, or alternatives that would not involve lease or transfer to Upstream, would be inconsistent with CEQA and in direct conflict with the Settlement Agreement, and must be rejected.

I cannot speak to any amendments to the LDA that occurred after the Settlement Agreement, except to note that if they are read to have the effect of restricting the City's discretion, they would directly conflict with the Settlement Agreement (see, e.g., ¶¶ 1.d.i. and 1.d.ii.) and would have no force.

Thank you for bringing this matter to our attention. Please feel free to contact me if you have any further questions.

Sincerely,

JANILL L. RICHARDS
Supervising Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

Attachments: Complaint in Intervention; Settlement Agreement

cc: Randy Riddle, City Attorney